No. 22105

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HERBOLD LABORATORY, INC. and
MILTON HERBOLD,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF

J. E. SIMPSON
615 South Flower Street, Suite 806
Los Angeles, California 90017

Attorney for Appellants

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APPELLANTS' OPENING BRIEF

Appeal by defendants in the court below from a judgment issuing an injunction in an action brought to recover civil penalties under Section 5(L) of the Federal Trade Commission Act (herein the Act), 52 Stats. 111, 15 U.S.C. §45(L) and imposing pecuniary penalties for violations of a final Cease and Desist Order issued by the Federal Trade Commission (herein either F.T.C. or the Commission).

I. JURISDICTIONAL STATEMENT

The District Court had jurisdiction of the penalty phase of the action under 28 U.S.C. §1345, if there was compliance with §16 of the Act (52 Stats. 116, 15 U.S.C. §56), otherwise not. Appellants contend that the Court had no jurisdiction, not only for non-compliance with Section 16, but also because the Act did not grant jurisdiction to District Courts to grant injunctive relief in civil penalty actions under Section 5(L) of the Act.

This Court has jurisdiction under 28 U.S.C. §1291.

II. STATEMENT OF UNDISPUTED FACTS

A. The Pleadings

The facts which are the basis of the judgments in the District Courts on those counts and points which are the subject of this appeal are undisputed. These facts are set forth below.

On May 7, 1951, the Commission issued a consent Cease and Desist Order (herein the Order) against Herbold Laboratory, Inc. and Milton L. Herbold pursuant to a complaint charging violations of Sections 12(a)(1) and 5(a) of the Act (15 U.S.C. §52(a) and §45(a)), in the dissemination in interstate commerce of false advertisements of "Herbold Pomade", a hair coloring product. That Order, so far as revelant here, provided that:

> "IT IS ORDERED that the respondents, Herbold Laboratory, Inc., a corporation, its officers, and Milton Herbold, individually and as an officer of Herbold Laboratory, Inc., their representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce of a cosmetic preparation designated as 'Herbold Pomade', or any preparation of substantially similar composition or possessing substantially similar properties, whether sold under the same name or any other name, do forthwith cease and desist from, directly or indirectly:
>
> "1. Disseminating or causing to be dissemi-

mails, or by any means in commerce as 'commerce' is defined in the Federal Trade Commission Act, any advertisement which represents, directly or by implication:

* * *

"(b) That said preparation will impart the former natural shade or color to gray, streaked, or faded hair.

* * *

"(e) That said preparation is a new, unique, or revolutionary product."

The Order was served on defendants and became final July 7, 1951. (C.T. 4).

Fourteen years later, on January 6, 1965, the United States filed a two count complaint against Milton Herbold only to recover $5,000.00 on each count for violation of Section 5(L) of the Act. The complaint alleged that Mr. Herbold violated the Order by offering for sale and selling in interstate commerce, under the name Hollywood Chemists, "Q. T. Color Balm", a hair coloring product possessing substantially similar properties to "Herbold Pomade". It alleged that the advertisements referred to represented that the product "would impart the former natural shade or color to gray, streaked, or faded hair." Count One alleged that about August 21, 1960, Mr. Herbold violated the Order by causing the dissemination in interstate commerce of an

in New York. Count Two alleged that he violated the Order by approving in November or December 1963, through an agent, an advertisement which appeared in the January 1964 issue of "Spencer Gifts" catalogue, and that the defendant thereby caused the dissemination in interstate commerce of catalogues containing said advertisement. Each Count demanded "Judgment against the defendant in the sum of $5,000.00," or a total of $10,000.00, together with plaintiff's costs and general relief. This was the sole relief sought.

Defendant answered, denying that he violated the Order as alleged.

Pretrial hearing was set for May 17, 1965.

On April 23, 1965, plaintiff filed a Motion for Leave to File an Amended Complaint, adding Herbold Laboratory, Inc. as a defendant.

On May 6, 1965, defendant Milton Herbold filed a Motion for Summary Judgment dismissing the Complaint as to him.

Plaintiff's Motion to Amend and defendant Milton Herbold's Motion for Summary Judgment were both heard on May 17, 1965 and both were granted. Summary Judgment dismissing the action as to Milton Herbold was entered on May 27, 1965. The basis of that Motion was that it was undisputed that Milton Herbold did not place, and had no knowledge of the placing of either of the advertisements in the newspaper or catalogue or of their dissemination in interstate commerce as alleged in the Complaint.

The relief sought by the Amended Complaint was the same as that sought by the original Complaint, to wit, the sum of $5,000.00 penalty in each Count.

file a Second Amended Complaint. This Motion, although opposed, was granted by the Court.

The Second Amended Complaint added four new counts against Herbold Laboratory, Inc. and included Milton Herbold individually as a defendant therein. These new counts alleged violations of the Cease and Desist Order by causing the dissemination in interstate commerce on February 10 and August 27, 1965 of advertisements of "Herbold Pomade" in the hereinafter named newspapers and dates. Each count alleged that the advertisements represented that the preparation "Herbold Pomade" 'would impart the former natural shade or color to gray, streaked, or faded hair." Count Three alleged that on February 10, 1965, defendants caused the dissemination on March 8, 1965 of an advertisement in the "Washington Post", a newspaper published in Washington, D. C., and on April 5, 1965, the same advertisement in the "Virginian Pilot", a newspaper published in Norfolk, Virginia. Count Four alleged that on February 10, 1965, the defendants caused the dissemination of an advertisement of "Herbold Pomade" in the "Evening Star" published in Washington, D. C. on March 23, and in the "Virginian Pilot" on March 23, April 20, June 1 and June 14, and in the "Richmond Times Dispatch", published in Richmond, Virginia, on March 23, April 20, May 20, and June 7, 1965, and in the "Beacon Journal", published in Akron, Ohio, on March 23, April 20, May 17, June 7, and June 22, 1965, of the same advertisement. Count Five alleged that on February 10, 1965, the defendants caused the dissemination of an advertisement of "Herbold Pomade" in the "Washington Post", published in Washington, D. C., on April 5 and May 4, 1965, and in

on March 8 and May 4, and in the "Virginian Pilot" on May 4, and in the "Beacon Journal" on March 8 and May 4, 1965. Count Six alleged that on August 27, 1965, the defendants caused the dissemination of an advertisement of "Herbold Pomade" in the "Evening Star", published in Washington, D. C., on September 21, October 4, October 18, and November 8, 1965, and in the "Washington Post" on September 27, April 12, October 26, and November 15, and in the "Virginian Pilot" on September 27, October 5, October 12, October 18 and November 2, 1965, and in the "Richmond Times Dispatch" on September 20, October 12, October 26, and November 8, 1965. It was alleged that each of these advertisements represented the preparation "Herbold Pomade" "would impart the former natural shade or color to gray, streaked, or faded hair", and that by the dissemination thereof in interstate commerce, the defendants violated the Cease and Desist Order. Each Count was followed by the prayer that plaintiff "demands judgment against defendants in the sum of $5,000.00." The sole relief prayed for in the Complaint was judgment against the defendants in the total sum of $30,000.00 on the six counts and for plaintiff's costs of suit and for "such other and further relief as this Court may deem just and proper." (C.T.9-10).

The defendants filed separate answers to these new counts.

B. <u>The Motions For Summary Judgment</u>

On September 16, 1966, each of the defendants filed a separate Motion for Summary Judgment. The Motion of Herbold Laboratory, Inc. was for Summary Judgment of dismissal on all six counts of the Second Amended Complaint and the Motion of Milton

inclusive. The basis of the Motions was that the advertisements referred to in the Second Amended Complaint did not represent that either "Q. T. Color Balm" or "Herbold Pomade" would "impart the natural shade or color to gray, streaked, or faded hair."

Plaintiff filed a Cross-Motion for Summary Judgment in its favor against Herbold Laboratory, Inc. on Counts Three, Four, Five and Six.

Following hearing, the Court granted the Motion of the plaintiff for Summary Judgment on Counts Three, Four, Five and Six and assessed penalties against Herbold Laboratory, Inc. of $500.00 on each of said four Counts and denied the Motions of both defendants for Summary Judgment in their favor. (C.T. 91).

On January 27, 1967, the Court filed Findings of Fact and Conclusions of Law on the Summary Judgment Motion, finding that the advertisements in Counts Three, Four, Five and Six did represent that "Herbold Pomade" would "impart the former natural shade or color to gray, streaked, or faded hair." It fixed the penalty at $500.00 on each of the four Counts against Herbold Laboratory, Inc., but deferred any judgment against it on Counts One and Two and on the remaining Counts as to the defendant Milton Herbold until the hearing and decision of the issues remaining. The findings were that "Herbold Pomade" represented that it "would impart the former natural shade or color to gray, streaked, or faded hair", that the corporation thereby violated the terms of the Cease and Desist Order, and that plaintiff was entitled to Summary Judgment against Herbold Laboratory, Inc. on Counts Three, Four, Five and Six and fixed a penalty on each of said Counts of $500.00, or a total of $2,000.00. The Court deferred

remaining issues in the case. (C.T. 88-91).

C. The Trial

At the trial of the case, the plaintiff produced two witnesses, who testified that in their opinion, Q. T. Color Balm did possess substantially similar properties to Herbold Pomade and the defendant Milton Herbold testified to the contrary. The Court found that Q. T. Color Balm did possess substantially similar properties to Herbold Pomade. Since this finding was predicated upon conflicting evidence, it cannot be said that it was clearly erroneous and therefore, the sufficiency of the evidence to support this finding is not raised on this appeal.

D. The Judgment

After the evidence on both sides was closed and the case was being argued, the plaintiff for the first time asked the Court to grant an injunction and the Court complied with this request.

The pleadings did not allege any facts showing any basis for injunctive relief. Neither of the three Complaints contained any allegation showing any basis or prayer for the issuance of injunctive relief and there is no finding of fact to support a judgment granting injunctive relief. The judgment in addition to providing for injunctive relief, provided that plaintiff recover from Herbold Laboratory, Inc. $250.00 on Count One and the same amount on Count Two, in addition to the $2,000.00 theretofore adjudged due on the Cross-Motion for Summary Judgment, and likewise assessed a penalty against Milton Herbold individually

total of $1,000.00. Judgment providing for an injunction reads as follows:

> "IT IS FURTHER ORDERED that the defendant Herbold Laboratory, Inc., a corporation, its officers, and Milton Herbold, individually and as an officer of Herbold Laboratory, Inc., their representatives, agents and employees, directly or through any corporate device, in connection with the offering for sale, sale or distribution in commerce of a cosmetic preparation designated as "Herbold Pomade" or "Q-T Color Balm", or any preparation of substantially similar composition or possessing substantially similar properties, whether sold under the same name or any other name, are hereby djoined from, directly or indirectly:
>
> "1. Disseminating or causing to be disseminated by means of the United States mails, or by any means in commerce as 'commerce' is defined in the Federal Trade Commission Act, any advertisement which represents, directly or by implication:
>
> * * *
>
> "(b) That said preparation will impart the former natural shade or color to gray, streaked, or faded hair.
>
> * * *

"2. Disseminating or causing to be disseminated by any means, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase in commerce, as 'commerce' is defined in the Federal Trade Commission Act, of said preparation, any advertisement which contains any of the representations prohibited in paragraph '1' of this order." (C.T. 92-94).

Judgment was entered on March 10, 1967. Defendants filed separate Motions for New Trial and to Amend the Findings of Fact and Conclusions of Law and Judgment. These Motions were denied by the Court, which filed a Memorandum Opinion on May 1, 1967 (C.T. 102-109).

E. The Appeal

Notice of Appeal by both defendants was filed June 29, 1967. Both defendants appeal from the Judgment of Injunction enjoining both defendants on all six Counts as hereinabove set forth, it being noted that the injunction applies to Counts One and Two involving Q-T Color Balm, and that Milton Herbold is not a defendant in either of said Counts. The ground of appeal from the injunction is that the sole remedy provided for violation of a final Cease and Desist Order is the imposition of a pecuniary penalty, this remedy being deemed by Congress to be adequate. The appeal by both defendants from the monetary penalties imposed

on Counts Three, Four, Five and Six is upon the ground that the advertisements there involved did not represent that Herbold Pomade would impart the former natural shade or color to gray, streaked or faded hair, and upon the ground that no evidence was introduced to show that the newspapers there involved were disseminated in interstate commerce by the defendants or that the defendants caused such dissemination. The appeal as to the judgment is also upon the ground that there was no proof or finding of compliance with Section 16 of the Act (15 U.S.C. §56). (C.T. 110-112, 116-118).

III. QUESTIONS PRESENTED

The following questions presented on this appeal were raised in the manner stated:

1. Did the District Court have power under the Act to enjoin possible future violations of the final Cease and Desist Order when Congress had provided a specific legal remedy for violations of Cease and Desist Orders of an action to recover a pecuniary penalty for such violations?

2. If the District Court had jurisdiction to grant injunctive relief, was it error for the Court to grant such relief when there were no pleadings, prayer, evidence or findings to sustain such grant, the Court had ordered partial summary judgment for a pecuniary penalty only and had fixed the amount thereof, but had deferred entering final judgment therefor until the time of trial and determination of the remaining issues?

3. Did the District Court have subject matter jurisdiction in the absence of pleadings, proof and findings of compliance with Section 16 of the Act (15 U.S.C. §56), providing that

whenever the Commission has reason to believe that any person, partnership or corporation is liable to a penalty under Section 14 or under Sub-Section (1) of Section 5 of the Act (15 U.S.C. §56), it shall certify the facts to the Attorney General whose duty it shall be to cause appropriate proceedings to be brought for the enforcement of the provisions of such section or sub-section?

4. Do the advertisements, the subject of Counts Three, Four, Five and Six, represent that Herbold Pomade would "impart the former natural shade or color to gray, streaked or faded hair"?

5. Did the Court err in finding that the advertisements, the subject of Counts Three, Four, Five and Six, were disseminated in interstate commerce, when no evidence was introduced to prove that they were, and said finding was based solely upon the court taking judicial notice that the "Washington Post" and "Evening Star" are circulated in interstate commerce, but there was no evidence or finding that the specific issue of the publications which were the subject of said cause of action were, in fact, disseminated in interstate commerce?

The first and second questions above were raised by appellants on their motions for a new trial, this being the first opportunity they had to do so because the first mention that was made concerning the issuance of an injunction was in the argument being made by one of appellee's attorneys following the close of all of the evidence. None of the three complaints filed by appellee contained any allegations of facts which are

generally considered as essential prerequisites to the granting of injunctive relief, that is, no facts were alleged showing great or irreparable damage or injury, or lack of an adequate remedy at law, or that there was danger that if the injunction was not issued that the defendants would violate the Cease and Desist Order, or that they were threatening to do so. When the court ordered summary judgment on Counts Three, Four, Five and Six, it fixed the penalty as $500.00 on each of said Counts and concluded that "judgment in accord with these conclusions should be rendered at the time of the adjudication of the remaining issues in this case." (C.T. 91). No findings or conclusions whatsoever were made with respect to injunctive relief.

The third question above also arose on the motion for a new trial.

The fourth question above arises from the face of the advertisements which are the subject of the Third, Fourth and Fifth Counts. In their motions for summary judgment, the defendants filed affidavits and exhibits, consisting of advertisements of competitors all of which disclose that the advertisements in question do not represent that Herbold Pomade or the competitive products would impart the former natural shade or color to gray, streaked or faded hair, but represented that such products would cause hair <u>to become young looking again</u>, and to cause the person using the same to <u>look younger</u> by darkening the hair, and that it would have a natural looking color.

The fifth question above arose at the time of the trial because no evidence was introduced by the plaintiff to prove that any of the advertisements referred to in the Second Amended

Complaint had been disseminated in interstate commerce, and no showing was made on plaintiff's motion for summary judgment, which was granted by the court, and no finding was made in connection therewith that the newspapers containing such advertisements were, in fact, disseminated in interstate commerce.(C.T.88-91)

IV. SPECIFICATION OF ERRORS

Appellants specify and rely upon the following errors of the District Court in its findings and judgment:

1. The Court erred in enjoining appellants from the doing of the acts referred to in the judgment and in holding that it had statutory authority to issue injunctive relief, because Congress had provided an adequate remedy at law for the violation of final Cease and Desist Orders, viz., a civil action to recover a pecuniary penalty, and had granted the Courts of Appeal, but not the District Courts, the power to issue injunctive relief enforcing such final Cease and Desist Orders.

2. The Court erred in granting injunctive relief in the absence of a complaint, evidence and findings showing that plaintiff was entitled thereto when the Court had already ordered partial summary judgment in favor of appellee for a pecuniary penalty only and fixed the amount thereof, but deferred entering final judgment until the trial and determination of the remaining issues.

3. The Court erred in holding that Section 9 of the Act (15 U.S.C. §49) granting power to District Courts to issue writs of mandamus in certain cases was applicable to enforcing final Cease and Desist Orders, since Congress had provided the remedy

of an action at law to recover pecuniary penalties only for violation of such orders and the power of the District Courts to issue writs of mandamus had been repealed by Rule 81(b) of the Federal Rules of Civil Procedure.

4. The Court erred in rendering judgment against appellants on Counts Three, Four, Five and Six because it was without jurisdiction over the subject matter thereof for failure of the appellee to allege and prove that the Commission had complied with Section 16 of the Act (15 U.S.C. §56), by certifying to the Attorney General the facts.

5. The Court erred in holding that the advertisements, the subjects of Counts Three, Four, Five and Six, stated and represented that Herbold Pomade would "impart the former natural shade or color to gray, streaked or faded hair" and in holding that such advertissments were disseminated in interstate commerce.

V. SUMMARY OF ARGUMENT

The District Court had no statutory power under the Federal Trade Commission Act to grant injunctive relief, restraining possible future violations of final Cease and Desist Orders. Congress, by the Wheeler-Lea Amendment to the Act, enacted in 1938, amended Section 5 of the Act by adding thereto subsection L (15 U.S.C. §45(L)) to provide an adequate remedy at law for violations of final Cease and Desist Orders, viz., a civil action to recover a pecuniary penalty of $5,000.00 for each violation. The Act does not confer jurisdiction on District Courts to grant injunctive relief for violations of such Orders

but only grants jurisdiction to the Courts of Appeal to make orders enforcing such Cease and Desist Orders. If it be assumed arguendo that the District Court had general equity powers to grant injunctive relief for violations of final Cease and Desist Orders, it was error to do so in the instant case, where there were not only no pleadings, evidence or findings showing that plaintiff was entitled thereto, but the Court in granting summary judgment on Counts Three to Six had adjudged that plaintiff should recover pecuniary penalties only.

Section 9 of the Act (15 U.S.C. §49), granting District Courts power to issue writs of mandamus compelling compliance with certain orders of the Commission in aid of its investigatory powers, relied upon by the Court as authority for granting injunctive relief, not only does not apply to final Cease and Desist Orders, but confers a legal and not an equitable remedy but the power of District Courts to issue writs of mandamus was repealed by Rule 81(b) of the Federal Rules of Civil Procedure.

The District Court did not have subject matter jurisdiction in the absence of pleadings, proof and findings that the Commission had complied with Section 16 of the Act (15 U.S.C. §56) which provides that whenever the Commission has reason to believe that any person is liable to a penalty under certain sections of the Act, it shall certify the facts to the Attorney General whose duty it shall be to cause appropriate proceedings to be brought for the enforcement of the provisions of such Sections.

The advertisements, the subject of Counts Three, Four, Five and Six, do not represent that Herbold Pomade would impart

the former natural shade or color to gray, streaked or faded hair, and if said advertisements were disseminated in interstate commerce, they did not violate the final Cease and Desist Order.

The finding that the advertisements, the subject of Counts Three, Four, Five and Six, were disseminated in interstate commerce is not supported by any evidence introduced, and the dissemination in interstate commerce of the specific issues of the newspapers in which said advertisements appeared, was not the proper subject of judicial notice.

VI. ARGUMENT

A. The District Court had no power, statutory or otherwise, to grant injunctive relief, restraining possible future violations of the final Cease and Desist Order, because Congress had provided an adequate remedy at law by a civil action to recover a civil penalty of not more than $5,000.00 for each violation, and had vested the power to issue injunctive relief only in the Courts of Appeal.

Under the original Federal Trade Commission Act (38 Stat. 719), Cease and Desist Orders issued by the Commission were neither final nor self executing. If a person subject to such an Order failed or neglected to obey it, the Commission could apply to the appropriate Circuit Court of Appeals "for the enforcement of its order." Upon the filing of the application and the transcript of the record before the Commission, the Circuit Court of Appeals "shall have jurisdiction of the pro-

ceeding and of the question determined therein and shall have power to make and enter . . . a decree affirming, modifying or setting aside the order of the Commission." The party affected by the order of the Commission also had the right to file a petition for review of the Commission's order in the Circuit Court of Appeals and upon the filing of the transcript, that court had the same jurisdiction to affirm, set aside or modify the order of the Commission as in the case of an application by the Commission for enforcement of its order. (Sec. 5(c), 15 U.S.C. §45(c)).

The Circuit Court of Appeals had power to make and enter a decree enforcing the order of the Commission to the extent that it was affirmed "and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite."

Section 5(d) (15 U.S.C. §45(d) provides that "upon the filing of the record with it the jurisdiction of the Court of Appeals of the United States to affirm, enforce, modify or set aside orders of the Commission shall be exclusive."

In Chamber of Commerce v. Federal Trade Commission (8 Cir. 1922), 280 Fed. 45, the court held that the jurisdiction of the Circuit Courts of Appeal was limited to the enforcement of the final orders of the Commission to cease and desist and that such jurisdiction was exclusive. This case was followed by the Court of Appeals for the Ninth Circuit in Crown-Zellerbach Corporation v. F.T.C. (9 Cir. 1946), 156 F.2d 927.

The statute did not provide any penalty for violation of the Commission's Cease and Desist Order. It was necessary for the Commission to institute a second proceeding, usually before the

Commission, and to prove a violation of the original order. The Commission would then apply to the Court of Appeals for an order enforcing its Cease and Desist Order.

In 1938, the Wheeler-Lea Amendment was enacted (52 Stat. 111) and this resulted in an entire change in the enforcement proceedings of the Act.

In F.T.C. v. Jantzen, Inc., (9 Cir. 1966), 356 F.2d 253, reversed on other grounds, 386 U.S. 228, 18 L.Ed.2d 11, this court reviewed the provisions of the original Act and the effect of the Wheeler-Lea Act in the following language:

> "No penalty attached to the violation of either type of order. In order to obtain an enforcing order in the Court of Appeals, a second violation had to be shown. This was done, as in this case, by the Commission's ordering an investigation, appointing a hearing officer, and, usually, holding a hearing. (See the Commission's Rules at 16 C.F.R. § 1.35.) If a violation was found, the Commission then sought enforcement in the Court of Appeals. No penalty attached to this second violation, other than the entry by the court of a decree enforcing the order. Such a decree had the force of an injunction, and, if thereafter the Commission found further violation, it could bring the respondent before the court for punishment for contempt.
>
> "Not surprisingly, this very clumsy and time consuming procedure was severely criticized,

and in 1938 the Congress responded by adopting the Wheeler-Lea Act, 52 Stat. 111, section 3 of which (52 Stat. 111-114) amended section 5 of the Federal Trade Commission Act. That section (3) states: 'Section 5 of such Act * * * is hereby amended to read as follows: * * *.' The amended section contains 12 paragraphs, designated (a) through (L). Paragraph (b) retains substantially the same provisions for the issuance of cease and desist orders as was contained in the old third paragraph. Paragraph (c), however, is different. It provides for a petition by the respondent to the Court of Appeals for review of the order. The petition must be filed within sixty days from the date of service of the order. The court has powers similar to those conferred by the old section, but with the added power to decree enforcement. In general, the new paragraph (c) is comparable to the old fifth paragraph of the section (38 Stat. 720). The former fourth paragraph, providing for a petition by the Commission, is omitted. Paragraphs (g), (h), (i), and (j) provide for the finality of Commission orders - either when the period in which to petition for review expires or, if there be such a petition, then within a fixed time after the completion of subsequent court and Commission proceedings. All of this is new, as is paragraph (L). It subjects violators of final orders to 'a civil penalty of not more than

$5,000 for each violation.' This has since been amended (64 Stat. 21, 1950) to provide that each separate violation shall be a separate offense, and, if the violation is a continuing one, each day of its continuance is a separate offense." (p.255)

And again at Page 256:

"If the order before us were an F.T.C. order, we would have no problem. The order would be final and enforcible via the civil penalty route, and the Commission would not be here."

In commenting upon subsection L of Section 5, the Supreme Court in the Jantzen case said:

"The apparent reason for this variance from the procedure of the Wheeler-Lea Act was because of the heavy penalties which the

Congress attached to the violation of final orders of the Commission under the Finality Act."

Section 5L of the Act (15 U.S.C. § 45L) as enacted as part of the Wheeler-Lea Act of 1938, provided that a person subject to a final Cease and Desist Order "shall forfeit and pay to the United States a civil penalty of not more than $5,000.00 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States." By further amendment in 1950, it was provided that each separate violation of such an order should be a separate offense except that in case of continuing failure or neglect to obey a final order, each day of continuance of such failure or neglect shall be deemed a separate offense.

As noted by the Supreme Court, supra, these amendments impose heavy penalties for violation of final Cease and Desist Orders. It is clear that in changing the entire procedure of the original Act with respect to Cease and Desist Orders, that Congress intended to and did provide an adequate remedy at law for the violation of a final Cease and Desist Order, which was an action to recover the civil penalty provided for in Section 5L. Although the Act is silent as to the court in which an action to recover the civil penalty should be filed, Section 1355 of 28 U.S.C. provides that District Courts shall have original jurisdiction of any action or proceeding for the recovery or enforcement of any fine, penalty or forfeiture, pecuniary or otherwise, incurred under any Act of Congress, but Congress with-

held from District Court jurisdiction the power to issue injunctions to enforce final Cease and Desist Orders. Instead of conferring jurisdiction in the District Court to grant injunctive relief, it conferred such jurisdiction upon the Courts of Appeal under the provisions of the Wheeler-Lea Act, and it provided in Section 5d that the jurisdiction of the Courts of Appeal to enforce those final Cease and Desist Orders of the Commission should be exclusive.

When Congress intended to confer upon District Courts the power to grant injunctive relief under the various statutes administered by the Federal Trade Commission, it was specific in conferring that power either upon the Courts of Appeal or the District Courts. Thus, under Section 13(a) of the Act (15 U.S.C. § 53), it conferred jurisdiction on the District Courts to issue <u>temporary restraining orders and preliminary injunctions</u> to "enjoin the dissemination or the causing of dissemination" of advertisements in violation of Section 12 "<u>pending the issuance of a complaint by the Commission under Section 5</u>." Section 12 deals with false advertisements in commerce to induce the purchase of foods, drugs, devices or cosmetics. Section 13 was added by the Wheeler-Lea Act and it is significant that although it conferred jurisdiction on District Courts <u>to issue preliminary injunctions in this limited type of case, it did not confer such jurisdiction with respect to final Cease and Desist Orders.</u>

Congress also conferred authority on the Commission to bring suits in the District Courts for <u>temporary injunctions and restraining orders</u> for violation of the Textile Fiber Productions Identification Act (15 U.S.C. § 70f), the Fur Products

Labeling Act (15 U.S.C. § 69g), the Wool Products Labeling Act (15 U.S.C. § 68e) and the Flammable Fabrics Act (15 U.S.C. § 1195). Each of these acts require a showing that a person is violating or is about to violate the act "and that it would be in the public interest to enjoin such violation" until a complaint under the Federal Trade Commission is issued and dismissed or a Cease and Desist Order made thereon has become final or is set aside by a court on review.

It is clear that there is no statutory authority in the Federal Trade Commission Act conferring jurisdiction on District Courts to issue injunctions to enforce final Cease and Desist Orders.

Congress deemed that the legal remedy of an action at law to recover the pecuniary penalty of not more than $5,000.00 for each violation to be an adequate remedy at law.

> "Where a remedy for any particular wrong or injury has been provided by statute, the general rule is that no relief in equity can be afforded in such case by injunction. Constitutional objections being eliminated, a court of chancery will not intervene merely to better such remedy as the legislature has deemed sufficient, and it has been said that the general rule is applicable although the provisions of the statute may conflict with the notions of natural justice entertained by a court of chancery."
>
> 43 C.J.S., p. 455, § 25, citing Morrison v.

Work, 266 U. S. 481, 69 L.Ed. 394;

Bowe v. Judson C. Burns, Inc., 137 F.2d 37.

"As the principal remedy afforded by courts of law for an injury is money damages, if such damages will constitute an adequate compensation for the injury threatened or inflicted, equity will not interfere by injunction. In such case plaintiff must resort to an action at law for the damages sustained."

43 C.J.S., p. 455, § 25.

In 1 High on Injunctions, Fourth Edition, § 29, it is said:

"Where a positive statutory remedy exists for the redress of particular grievances, a court of equity will not interfere by injunction and assume jurisdiction of the questions involved; nor will it enjoin proceedings under such statutory remedy, since such interference would place the judicial above the legislative power of the Government . . . And in the courts of the United States the objection to granting relief by injunction, that the party aggrieved has ample remedy at law, need not be taken in the pleadings, but may be enforced by the court sua sponte, since it goes to the jurisdiction of the forum."

Allen v. Car Co., 139 U.S. 658; Hoey v. Coleman,

In <u>Morrison v. Work</u>, supra, action was brought seeking an injunction to restrain the defendant governmental officials from doing certain acts which plaintiffs alleged deprived plaintiffs of their property in violation of the Constitution. It was alleged that the Secretary of Interior refused to allot any of the reservation lands to the Indians or to permit the Indians to select or receive allotments. The Supreme Court held that if any Indian who was entitled to an allotment requested the same, he had an adequate remedy at law to bring a suit against the United States to secure the allotment, and that this statutory remedy was sufficient to deny injunctive relief.

In <u>United States v. Harris</u>, 177 U.S. 305, 44 L.Ed. 780, an action was filed to recover penalties for alleged violation of laws relating to the transportation of live stock. The statute provided that the penalties should be recovered by civil action. The defendants were receivers for the railroad and the question was whether they were liable for the penalties. The Supreme Court held that the statute was penal and was, therefore, to be strictly construed and that it was for the legislature and not the courts to define an offense, and provide for its punishment.

In <u>Bowe v. Judson C. Burns, Inc.</u>, supra, the plaintiffs, who were former employees of the defendant, sued the defendant corporation, its President, and a union and union officials, alleging that plaintiffs had been required to work in excess of the maximum number of hours provided for in the Fair Labor Standards Act without being paid adequate compensation. Plaintiffs filed a second action, alleging that they were being

threatened with expulsion from the union because of the first action they filed. In the second action, they sought an injunction to restrain the defendants from interfering with the prosecution of the first action and from discharging them. The court granted a motion to dismiss upon the grounds that injunctive relief under the Act could be granted only against an employer and that the union was not an employer (46 F.Supp. 745). On appeal, the Court of Appeals held that the definition of the word "person" contained in the Act was broad enough to include a union but it also held that the sole remedy of an employee was to recover back wages and liquidated damages, and that injunctive relief could not be granted in a suit filed by employees, but could only be granted in an action brought by the Administrator.

In <u>Utah Fuel Co. v. National Bituminous Coal Commission</u>, 101 F.2d 426, affirmed 306 U.S. 56, orders of the National Bituminous Coal Commission were involved. The Act contained no express provision for injunctive relief. It did provide that the Courts of Appeal should have exclusive jurisdiction "to enforce, set aside or modify orders of the Commission." The court held that injunctive relief was not the proper remedy because the statute made adequate provision for judicial review, thereby providing an adequate remedy at law.

In the present case, <u>Congress has provided that the Courts of Appeal shall have exclusive jurisdiction to enforce Cease and Desist Orders</u>. <u>It has provided that for violation of such orders, a pecuniary penalty for each violation is an adequate remedy</u>. Under the well established rule that proceedings in equity for injunctions cannot be maintained where the complain-

ing party has an adequate remedy at law (Black River Valley Broadcasting v. McNinch, 101 F.2d 235; Smith v. Duldner, 175 F.2d 629), the District Court was without power to grant injunctive relief. In considering this question, it should be kept in mind that District Courts are courts of limited jurisdiction and have only the power and the jurisdiction conferred upon them by statutory enactments of Congress (United States v. Parkinson, 135 F.Supp. 208, affirmed 240 F.2d 918). On appeal in this case, this court held that the Federal Food, Drug and Cosmetic Act had provided three specific powers, consisting of criminal prosecution, seizure and injunction, and that the "grant of such specific powers would be indicia of the denial of more extensive authority."

B. It was error for the Court to grant injunctive relief in the absence of pleadings, evidence and findings showing that plaintiff was entitled thereto, including a showing of equity jurisdiction.

District Courts are Courts of limited jurisdiction. They must find their jurisdiction in express provisions of Federal statutes.

Sheldon v. Sill, 49 U.S. 441, 449; 12 L.Ed. 1147, 1151;

Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371; 84 L.Ed. 329;

Schroeder v. Freeland, 188 F.2d 517;

Gillis v. California, 293 U.S. 62, 79 L.Ed. 199;

A party seeking to invoke the jurisdiction of a Federal court must demonstrate that the case is within the jurisdiction of that court. The presumption is that the court lacks jurisdiction in a particular case unless plaintiff has demonstrated that jurisdiction over the subject matter exists.

Turner v. President etc. of the Bank of North America, 4 Dall. 8, 1 L.Ed. 718.

To overcome the presumption of lack of jurisdiction, facts must be affirmatively alleged, disclosing jurisdiction.

Bingham v. Cabot, 3 Dall. 382, 1 L.Ed. 646.

Rule 8(a) F.R.Civ.P. provides that a pleading setting forth a claim for relief must contain "a short and plain statement of the grounds upon which the court's jurisdiction depends." The Complaint alleged that jurisdiction was under 28 U.S.C. § 1345 (C. T. 2). That section provides that District Courts shall have original jurisdiction of all civil actions commenced by the United States. This section does not grant power to District Courts to grant injunctive relief in proceedings to recover civil penalties for violation of final Cease and Desist Orders.

In the absence of statute providing for statutory injunctions where the public interest may be affected, it is a rule of general application that a pleading seeking injunctive relief must allege facts, not only showing jurisdiction, but also, that the acts sought to be enjoined will in all probability be committed by the defendant unless he is restrained, and that

the acts committed will result in substantial injury to the plaintiff, that a refusal to grant the injunction will result in irreparable injury to the plaintiff, and that plaintiff does not have an adequate remedy at law. The Complaint should contain a prayer specifically praying for injunctive relief, including a description of the injunctive relief sought.

43 C.J.S., (Injunctions), § 182, pp. 857-867.

See cases cited in 14-A Cyc. Fed. Proc. §§ 73.11, 73.12 and 73.13.

"The basis of injunctive relief in the Federal courts has always been irreparable harm and inadequacy of legal remedies."

Beacon Theaters v. Westover, 359 U.S. 500, 3 L.Ed.2d 988, at 995;

Pennsylvania v. Wheeling & B. Bridge Co., 13 How 518, 561, 14 L.Ed. 264, 267.

Enelow v. New York Life Insurance Co., 293 U.S. 379, 74 L.Ed. 440.

In the instant case, there are no allegations in the Complaint disclosing that any of the defendants will, in all probability, commit any of the acts alleged unless restrained from so doing, or that the acts will result in substantial injury to the plaintiff. The Court made no finding that either of the defendants would in all probability commit any of the acts alleged unless restrained, or that irreparable injury to plaintiff would result. No facts are alleged and there are no findings

that plaintiff does not have an adequate remedy at law or that a refusal to grant an injunction would result in irreparable injury to the plaintiff. The Complaint does not contain any prayer for injunctive relief.

Since Congress has provided an adequate remedy at law for violations of the final Cease and Desist Order, it is doubtful that the Court could grant injunctive relief even if the Complaint did contain the requisite allegations of jurisdiction, threatened injury, irreparable damage, inadequate remedy at law, and a prayer for injunctive relief.

In the instant case, the only relief sought by the prayer was the imposition of a pecuniary penalty. An injunction will not ordinarily be granted under a prayer for general relief.

43 C.J.S., pp. 866-867.

In ordering summary judgment in favor of the plaintiff and against the defendant corporation on Counts Three, Four, Five and Six, the court fixed a penalty of $500.00 on each Count or a total of $2,000.00. (C.T. 91).

The court did not by such order grant any injunctive relief. Instead, the court ruled that since issues were raised as to the responsibility of Milton Herbold for the advertisements, the subject of Counts Three, Four, Five and Six, summary judgment would not be granted as to him on those Counts. The order provided, however, that "judgment in accord with these conclusions should be rendered at the time of adjudication of the remaining issues in this case." (C.T.91:23). Since there were multiple claims as well as multiple parties, this order

was proper under Rule 54(b) F.R.Civ.P. Under these circumstances it would seem clear that the final judgment entered should have been limited to a judgment for the pecuniary penalties fixed by the order granting partial summary judgment as to Counts Three, Four, Five and Six against the defendant corporation.

Milton Herbold individually was not a defendant in Counts One and Two, involving the dissemination of two advertisements of the product "Q. T. Color Balm". Despite this fact, the injunction applies to him with respect to this product.

We respectfully submit that if the Court had equity jurisdiction in this action, it was error to grant injunctive relief in the absence of pleading, prayer, evidence and findings establishing plaintiff's right thereto.

C. The Cases Relied Upon By The District Court As Authorizing Statutory Equitable Relief Are Not In Point Because In Each Such Case, The Statute Specifically Authorized The Equitable Remedy Of Injunction.

The Court in its Memorandum Opinion (C.T.104), cited and relied upon Mitchell v. DeMario Jewelry, Inc., 361 U.S. 288, 4 L.Ed.2d 323, which in turn cited and relied upon the case of Porter v. Warner Holding Co., 328 U.S. 395, 90 L.Ed. 1332, as authorizing the District Court to grant injunctive relief.

Porter involved Section 205(a) of the Emergency Price

Control Act, which specifically authorized the Administrator to apply to the Court "for an order enjoining such acts or practices, or for an order enforcing compliance with such provisions, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond." The Administrator filed an action alleging that defendant was collecting over-ceiling rents from tenants and praying for an injunction restraining the defendant from collecting over-ceiling rents. By amendment, the Administrator sought an order requiring the defendant to offer to refund to the tenants the excess rents collected. The Supreme Court held that in seeking an injunction to enjoin defendant from committing acts and practices made illegal by the Act, the Administrator was invoking the equitable jurisdiction of the District Court which was specifically conferred by the statute. This statutory equitable jurisdiction carried with it all other inherent equitable powers, including the power to grant a mandatory injunction ordering restitution of the over-ceiling rents. The court further held that the restitution order was also authorized as an "other order" specifically authorized by the statute. The distinction between the Porter case and the instant case is obvious. The Federal Trade Commission Act does not grant jurisdiction to District Courts to enjoin violations of the Act or to issue "other orders". That Act grants exclusive jurisdiction only to the Courts of Appeal to enforce orders of the Commission.

The DeMario case, supra, is similarly distinguishable.

That was an action brought by the Secretary of Labor under the Fair Labor Standards Act of 1938 to enjoin an employer from violating Section 15(a)(3) of that Act, by not paying the correct amount of wages. Section 17 of the Act, 52 Stat. 1069, 29 U.S.C. §217, provided that 'the District Court . . . shall have jurisdiction, for cause shown, to restrain violations of Section 215 of this Title.' The court, relying upon the Porter case, held that the statute specifically granted the District Courts the equitable power of injunction to restrain violations of the Act and that this grant carried with it all powers of a court of equity including the power to order the defendants to pay the employees the correct amount of wages due to them, including reimbursement for loss of wages caused by unlawful discharge or other discrimination. Here again was a statute specifically conferring on the District Court the power to grant injunctive relief. The Federal Trade Commission Act confers no such power upon the District Courts with respect to final Cease and Desist Orders.

Other statutes specifically conferring such equitable jurisdiction in similar or almost identical language to the statutes involved in Porter and DeMario are referred to in U.S. v. Parkinson, 135 F.Supp. 208, viz., the Fair Labor Standards Act, 29 U.S.C., §201-209, the Food, Drug and Cosmetic Act, 21 U.S.C. §301-392, and the Sherman Anti-Trust Act. In Parkinson, the court held that in an action seeking an injunction under the Food, Drug and Cosmetic Act, the court was not authorized to order refunds to be made to purchasers of the product involved. The court pointed out that the basic differences between the statutes

involved in the Porter case and the Food, Drug and Cosmetic Act was that in the former, one of the purposes was to prevent landlords from enriching themselves by charging over-ceiling rents. The same principle would apply to the DeMario case, where one of the purposes is to prevent employers from underpaying their employees and thereby enriching themselves. However, the purpose of the Food, Drug and Cosmetic Act is different.

On appeal, this court in the Parkinson case expressly approved of the Parkinson District Court decision by Judge James M. Carter in the following language:

> "In a sound and able opinion, Hon. James M. Carter, United States District Judge, analyzed the problem, reviewed the statutes and determined that the particular enactment did not confer jurisdiction upon the United States District Courts to make such an order. With this opinion we agree, and the conclusions thereof we affirm. The jurisdiction of the District Court must be found in the language and implications of the particular statute." (240 F.2d 918, 919).

Referring to the powers granted under the Food, Drug and Cosmetic Act, this court at page 920 said:

> "The Congress granted three specific powers by this Act. The first was the power to bring criminal prosecutions for violations. The second permitted seizure of drugs proscribed in interstate commerce. The third empowered the courts to

restrain violations. Ordinarily, grant of such specific powers would be indicia of the denial of more extensive authority."

And again, at Page 922, this court said:

> "When Congress authorizes the enforcement by an administrative body of rules, regulations or orders promulgated by it, the history of equity and the Court of the Star Chamber in this type of litigation should not be forgotten. <u>The use of the extraordinary remedies of equity in governmental litigation should never be permitted by the courts unless clearly authorized by the statute in express terms</u>. Anything which savors of a penalty should not be permitted unless Congress has expressly so provided, since the spirit of equity abhorred such punitive measures."

The learned District Judge in the instant case recognized that the Federal Trade Commission Act did not specifically confer jurisdiction upon District Courts to grant injunctive relief with respect to final Cease and Desist Orders (C.T.104). He quoted, however, from the fourth paragraph of Section 9 of the Act, 15 U.S.C. § 49, which provided that upon application of the Attorney General at the request of the Commission, District Courts of the United States "shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply

with the provisions" of certain sections of the Act "or any order the Commission made in pursuance thereof."

Not only is mandamus not an equitable remedy, but the power to issue writs of mandamus was denied to the District Courts by Rule 81(b) of the Federal Rules of Civil Procedure. In addition, the history of Section 9 of the Act clearly demonstrates that it was not intended to apply to final Cease and Desist Orders, because Congress had vested exclusive jurisdiction in the Courts of Appeal to make and enter orders enforcing compliance with such final Cease and Desist Orders.

Mandamus is a common law legal remedy although its issuance is largely controlled by equitable principles.

Duncan Townsite Co. v. Lane, 245 U.S. 308, 62 L.Ed. 309;

Heine v. Board of Levee-Commissioners, 19 Wal. 655, 22 L.Ed. 223;

U. S. ex rel Greathouse v. Dern, 288 U.S. 352, 77 L.Ed. 1250;

Snow v. Roche (9 Cir.1944), 143 F.2d 718;

Doehler Metal Furniture Co. v. Warren, 129 F.2d 43.

Since mandamus is a legal rather than an equitable remedy, injunctive relief will ordinarily not be granted where the mandamus remedy is available. (43 C.J.S. 456).

Rule 81(b) of the Federal Rules of Civil Procedure provides that writs of mandamus are abolished and that relief theretofore available by mandamus may be obtained by appropriate action or by appropriate motion under the practice prescribed in the rules.

28 U.S.C. § 2072, empowering the Supreme Court to prescribe rules of practice and procedure for the District Courts in civil actions, provides that "all laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." It would seem to follow, therefore, that Rule 81(b) supersedes all Acts of Congress relating to writs of mandamus in conflict with the rules.

For these reasons, not only does Section 9 of the Act, authorizing District Courts to issue writs of mandamus, not provide an equitable remedy, but if it did, the power to issue such writs was repealed and superseded by Rule 81(b) F.R.Civ.P.

An analysis of Section 9 of the Act (15 U.S.C. § 49), discloses that it was not intended to apply and does not apply to final Cease and Desist Orders issued by the Commission.

Section 9 has remained unchanged since it was enacted in 1914. The first three paragraphs of that section provide that for the purposes of the Act, the Commission or its duly authorized agent shall have access to, for the purpose of examination, and the right to copy, any documentary evidence of any corporation being investigated or proceeded against, the power to require by subpena the attendance and testimony of witnesses and the production of documentary evidence relating to any matter under investigation. The attendance of witnesses may be compelled by subpena and disobedience thereof may result in the Commission invoking the aid of the United States courts to require the attendance of the witnesses. District Courts are empowered to issue an order requiring corporations and persons to appear

before the Commission or produce evidence, in case of their contumacy or refusal to obey any subpena issued to them, and to punish failure to comply with such a court order as contempt. The fourth paragraph, relied upon by Judge Gray, provides that "upon the application of the Attorney General of the United States, at the request of the Commission, the District Courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the Commission made in pursuance thereof." The remaining paragraphs deal with testimony by deposition, witness fees, and the granting of immunity to witnesses with respect to testimony which may tend to incriminate them.

As noted above (P. 17), at the time of the enactment of this Section in 1914, Section 5(c) of the Act provided that if a person subject to the order of the Commission failed or neglected to obey the same, the Commission might apply to the Circuit Court of Appeals of the United States "for the enforcement of its order", the Court of Appeals was granted jurisdiction of the proceeding and to make its own decree affirming, modifying or setting aside the order of the Commission. So also, any party required by the order of the Commission to cease and desist from doing certain things had the right to petition the Court of Appeals for a review of the Commission's order and that court had the same jurisdiction to affirm, set aside or modify the order as in the case of an application by the Commission to enforce the order. Section 5(d) provided that "<u>the jurisdiction of the Court of Appeals</u> of the United States <u>to</u> affirm, <u>enforce</u>,

modify or set aside orders of the Commission shall be exclusive."
Since the Circuit Courts of Appeal were vested with exclusive jurisdiction to enforce final Cease and Desist Orders of the Commission, it follows that the Congress did not, by empowering District Courts to issue writs of mandamus, intend that that provision should apply to final Cease and Desist Orders as to which it had vested exclusive jurisdiction in the Circuit Courts of Appeal.

Under this view of Section 9 of the Act, the provision with respect to writs of mandamus applies only to commanding compliance with orders of the Commission made pursuant to the first three paragraphs of Section 9, with investigatory proceedings being held and conducted by the Commission, that is, to compel corporations to grant access to their records to agents of the Commission, to compel the attendance of witnesses, and the production of evidence on orders other than final Cease and Desist Orders. This is the construction of Section 9 made by the Court of Appeals for the Eighth Circuit.

In Chamber of Commerce, etc. v. Federal Trade Commission (8 Cir. 1922), 280 Fed. 45, the Commission had filed a complaint against the Minneapolis Chamber of Commerce, its officers, board of directors, and others, charging that from a preliminary investigation made by the Commission it appeared that the Respondents were using unfair methods of competition in interstate commerce, in violation of the F.T.C. Act. The Respondents made a number of motions before the Commission, all of which were denied. Respondents then filed a petition in the Circuit Court of

Appeals to set aside the order of the Commission denying their motions. In dismissing the petition for lack of jurisdiction, the court said:

> "The act itself clearly specifies when the jurisdiction of the Circuit Courts of Appeals may attach and to what extent that jurisdiction may be exercised. The power of the court is limited to the enforcement of the final orders of the commission to cease and desist, upon the application of the commission, and to review of such orders at the request of the party against whom such orders are made, and in such cases it has power to enforce, affirm, modify or set aside as it may deem proper. Immediately after these powers and duties are set forth in section 5 of the act this clause occurs:
>
> > "'The jurisdiction of the Circuit Court of Appeals of the United States to enforce, set aside, or modify orders of the Commission shall be exclusive.'
>
> "Manifestly this refers to the specific powers just previously recited, and this is made still more apparent by the clause which next follows, wherein it is said:
>
> > "'Such proceedings in the Circuit Court of Appeals shall be given

precedence over other cases pending therein, and shall be in every way expedited.'"

The court then considered the power of District Courts conferred by Section 9 and after quoting the fourth paragraph thereof, said:

"The final language of this clause is very broad, but we are convinced that it is intended to refer only to orders of the nature of such as are involved in paragraph B of section 6, which empowers the commission to require, by general and specific orders, certain corporations to file specified reports and answers under oath or otherwise. We do not think this language was intended to give the District Court jurisdiction over orders such as that now before us."

This case was cited and followed by the Circuit Court of Appeals for the Ninth Circuit in Crown-Zellerbach Corporation et al v. F.T.C., 156 Fed.2d 927.

The trial court in the instant case cited the case of Fleming v. Lowell Sun Co., 36 F.Supp. 320, reversed 120 F.2d 213, a decision by the District Court of Massachusetts as holding that the fourth paragraph of Section 9 of the Act, dealing with mandamus, must refer to something besides requiring the testimony of witnesses or the production of documentary evidence. The excerpt

from the decision of the court in that case, hereinafter set forth, discloses that it expressly refrained from deciding whether the fourth paragraph of Section 9 was or was not limited to compelling compliance with the matters referred to in the first three paragraphs of that section. In the Fleming case, the wage and hour administrator of the Labor Department applied to the District Court for an order directing the respondent to show cause why it should not be required to appear before the Administrator and produce books, records, etc., and give evidence required by a subpena duces tecum served upon the respondent. The respondent moved to vacate the order to show cause and this was denied by the court. Section 9 of the Fair Labor Standards Act, 29 U.S.C. §209, provided that for the purpose of any hearing or investigation provided for under that chapter, the provisions of Section 49 and 50 of Title 15 United States Code, relating to the attendance of witnesses and the production of books, papers and documents under the Federal Trade Commission Act, were made applicable to the jurisdiction powers and duties of the Administrator and the Secretary of Labor and the industry committees. The court said, at Page 325:

> "The respondent further argues that the fourth paragraph of Section 9 of the Federal Trade Commission Act limits the authority of the Administrator to bring these proceedings. This paragraph reads as follows: 'Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall

have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act [subdivision of this chapter] or any order of the commission made in pursuance thereof.'

"Clearly, in view of the fact that the preceding paragraphs of this section expressly authorize the proceeding with which we are concerned, this paragraph must refer to something besides requiring the testimony of witnesses and production of documentary evidence. It can be construed as an added and alternative method of compelling obedience to a subpoena of the Administrator or it may have reference solely to 'orders of the commission'. Cf. Chamber of Commerce of Minneapolis et al. v. Federal Trade Commission et al., 8 Cir., 280 F. 45, 48, where it was held that the orders referred to in this clause were those involved in paragraph (b) of Section 6 of the Federal Trade Commission Act, 15 U.S.C.A. § 46(b). <u>It is not necessary to determine whether it makes provision for an alternative method or that it refers merely to orders described under Section 6 (b) because of the fact that it is plain that it in no way abolishes the authority to proceed as outlined in the preceding three paragraphs of Section 9.</u>"

Here the court was considering a single isolated section of the Act and was not considering the history or provisions of the Federal Trade Commission Act making final Cease and Desist Orders of the Commission subject solely and only to enforcement by the Circuit Courts of Appeal, or to the fact that Section 45(L) of that Act provided that the sole remedy for violation of a final Cease and Desist Order was a pecuniary penalty.

The underscored portion from the Opinion of the Court clearly demonstrates that the court did not even decide that the District Courts had power to issue writs of mandamus or injunctions to enforce compliance with final Cease and Desist Orders.

From the foregoing, it follows that Section 9 of the Federal Trade Commission Act (15 U.S.C. § 49), authorizing the District Courts on application of the Attorney General to issue writs of mandamus, provides a legal and not an equitable remedy which may be used in a limited type of cases only. Such section is not applicable to final Cease and Desist Orders, in which cases the law provides that exclusive jurisdiction to enforce the orders of the Commission is in the Courts of Appeal and that the jurisdiction of the District Courts is limited to the imposition of civil pecuniary penalties for violations of such orders. The cases cited and relied upon by the District Judge are inapplicable because in each of those cases, the statutes involved specifically granted the equitable remedy of injunction power to the District Courts. Here it is granted to the Courts of Appeal.

When Congress enacted the Wheeler-Lea Amendment in 1938 providing the new single step procedure for enforcing

final Cease and Desist Orders, it provided for a pecuniary penalty for violation thereof. This penalty was recoverable in a "civil action". The present case is such a civil action. It is clearly not an "application of the Attorney General of the United States, at the request of the Commission" for the issuance of a writ of mandamus "commanding any person or corporation to comply with the provisions" of the Act or of any order of the Commission made pursuant thereto.

The Wheeler-Lea Amendment and the Federal Rules of Civil Procedure, including Rule 81(b), which revoked the power of the District Courts to issue writs of mandamus, were adopted in 1938. From this it would seem to follow that if Section 9 of the Act ever had any application to final Cease and Desist Orders, Congress, by substituting the civil pecuniary penalty for violations of such orders as a substitute for enforcement thereof by writs of mandamus, revoked the jurisdiction of the District Courts to issue such writs.

If District Courts had jurisdiction to issue injunctions enforcing final Cease and Desist Orders, are such orders merged into and superseded by the judgment under the doctrine of merger? Under that doctrine, a claim or cause of action is merged into and superseded by a final judgment involving the same cause of action and issues. A new liability on the judgment is created.

<u>U.S. v. Leffler</u>, 11 Pet. 86, 9 L.Ed. 642;

<u>Gaines v. Miller</u>, 111 U.S. 395, 28 L.Ed. 466;

<u>Commissioner of Internal Revenue v. Sunnen</u>, 333 U.S. 591, 92 L.Ed. 898;

If the Cease and Desist Orders are merged into and superseded by the judgment, and the judgment should be violated, what is the remedy? Is the sole remedy a contempt proceeding? Can there be a civil penalty action for violation of the Cease and Desist Order, when such order has been superseded by and merged into the judgment? Certainly, the court cannot superimpose the contempt remedy on the civil pecuniary penalty remedy that Congress has provided.

These questions pose problems which are dissipated by following the clear provisions of the Act, by holding that the sole remedy for violation of final Cease and Desist Orders is the recovery of the pecuniary penalty.

D. <u>The court was without subject matter jurisdiction in the absence of pleading and proof of compliance with Section 16 of the F.T.C. Act requiring certification of the facts by the Commission to the Attorney General as a prerequisite to suit.</u>

Section 16 of the Federal Trade Commission Act, 52 Stat. 114; 15 U.S.C. § 56, provides that "whenever the Federal Trade Commission has reason to believe that any person, partnership, or corporation is liable to a penalty under Section 14 or under sub-section L of Section 5, it shall certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought for the enforcement of the provisions of such section or sub-section."

In U. S. v. St. Regis Paper Co., (2 Cir. 1966), 355 F.2d 38, the Court of Appeals held that certification of the facts isclosing that a respondent in a final Cease and Desist Order ase is liable to a penalty under sub-section L of Section 5 of ne Act, was mandatory and jurisdictional, and that in the bsence of proof thereof, the District Court was without subject atter jurisdiction.

In the instant case, the complaint did not allege, no vidence was introduced to show, and there was no finding by the ourt of the required certification of the facts by the Commis-ion to the Attorney General (Comp., C.T. 2-10, Findings on ummary Judgment, C.T. 88-91, Findings after Trial, C.T. 95-98). ack of subject matter jurisdiction was raised by the defendants n their motion for a new trial (C.T. 101). Under the holding f the St. Regis case, the court below lacked subject matter urisdiction, particularly over Counts Three, Four, Five and ix, which were added after the original action had been insti-uted.

E. The finding that the advertisements involved in Counts Three, Four, Five and Six were disseminated in interstate commerce was not supported by any evidence and such dissemination was not the proper subject of judicial notice.

Counts Three, Four, Five and Six (C.T. 5-9) alleged hat the advertisements there pleaded (Exhibits D, E, F and G, .T. 24-27) were caused to be disseminated in interstate

ommerce by the defendants in the "Washington Post" and Virginian Pilot" (Count Three, C.T. 6); in the "Evening Star" ublished in Washington, D. C., the "Virginian Pilot" published n Norfolk, Virginia, the "Richmond Times Dispatch" published n Richmond, Virginia, and the "Beacon Journal" published in kron, Ohio (Count Four, T.D. 6-7); the "Washington Post", Richmond Times Dispatch", "Virginian Pilot" and "Beacon Jour-al" (Count Five, C.T. 7); the "Evening Star", "Washington ost", "Virginian Pilot" and "Richmond Times Dispatch" (Count ix, C.T. 8-9).

No evidence to support these allegations was produced by he Government on its cross-motion for summary judgment which as granted by the Court (C.T. 7-8).

No finding was made by the Court in granting summary udgment to plaintiff on these four counts, either that Herbold omade was offered for sale in interstate commerce or what ssues of what newspapers were disseminated in interstate com-erce in connection therewith (C.T. 88-91).

After trial of Counts Three, Four, Five and Six as to he defendant Milton Herbold individually, at which no evidence as introduced to prove the above mentioned allegations, or that r. Herbold, individually, was responsible for the publication f said advertisements, and following oral argument at which the ntire lack of such evidence was called to the attention of the ourt, the Court supplied the lack of evidence by its Finding f Fact 7, which was based on the "court taking judicial notice hat the 'Washington Post' and 'Evening Star' are circulated in nterstate commerce." No finding was made that the advertise-

ents published in the "Virginian Pilot", or the "Richmond Times ispatch", or the "Beacon Journal" were or were not disseminated n interstate commerce.

The Federal Trade Commission Act derives from and is ased upon the Commerce Clause of the Constitution, Article 1, ection 8, Clause 3. This is the source of the power of the ommission to issue Cease and Desist Orders.

One of the essential elements to the jurisdiction of the ommission to issue Cease and Desist Orders is proof that the espondents in such a proceeding disseminated or caused to be isseminated in interstate commerce, an advertisement which vio-ated the provisions of the Act. (C.T. 3-4).

Since the Order itself is directed against the dissemin-tion of advertisements in interstate commerce, the burden was pon the Government in an action to recover penalties under sub-ection L of Section 5 of the Act, to prove that the advertise-ents relied upon were disseminated in interstate commerce.

Since this was an action to recover penalties for viola-ion of an order, the complaint should be strictly construed gainst the Government. (Connolly et al v. U.S. (9 Cir. 1925), 49 F.2d 666).

In the Connolly case, an action was brought by the nited States, seeking an injunction, damages and other relief ecause of the defendants' alleged acts in herding cattle and orses on an Indian reservation without a grazing permit. The ourt, after trial, granted the injunction, nominal damages, and mposed a penalty under the statute. The complaint prayed for n injunction, for damages in a specified amount, and for gen-

The Connolly case is just the reverse of the present case. In the present case, the only relief sought was the statutory pecuniary penalties. No reference was made to an injunction, yet the court granted one in addition to imposing the penalties. In this connection, the Court of Appeals in the Connolly case said, "The lower court's opinion admits that no reference was made to the statutory penalty in the complaint. According to the trial court's opinion and as plainly shown by the record, the matter of the statutory penalty was never litigated. It might have been raised in final argument but that was after the evidence was in - - -. Although the distinctions between law actions and suits in equity are abolished, we must still keep in mind, in a case like the instant one, that statutes imposing penalties are strictly construed and pleadings to recover statutory penalties are likewise strictly construed. Furthermore, where the statute, as here, provides a remedy for the collection of a penalty, that remedy must be followed." This court reversed the District Court's judgment awarding a penalty. The above language of the Court of Appeals is in point in the instant case.

It has generally been held that in actions for penalties for violations of orders, all questions of doubt must be resolved in favor of the defendants and that the burden is upon the Government to prove its case by evidence beyond a reasonable doubt.

Chaffee & Co. v. U.S., 85 U.S. 516, 21 L.Ed. 908 (an action for penalties for alleged frauds upon the Revenue.);

Bowles v. Farmers National Bank, 147 F.2d 425;

Hatfried, Inc. v. C.I.R., 162 F.2d 628;

Ward Ins. Co. v. Pipes, 255 F.2d 464;

U.S. v. St. Regis Paper Co., 181 F.Supp. 862;

One 1958 Plymouth Sedan v. Pennsylvania,

380 U.S. 693, 14 L.Ed.2d 170.

Certainly a court should not be permitted to instruct a jury in a penalty case requiring proof to the degree above mentioned, that one of the essential elements must be found as a fact against the defendant because the court or the jurors must judicially notice it even though they have no knowledge of it.

In the instant case, we wonder why the plaintiff did not, either in support of its Motion for Summary Judgment or at the trial, produce evidence that the specific issues of the newspapers in which the advertisements were admittedly published were disseminated in interstate commerce if they, in fact, were. Certainly the astute prosecutors knew that they had the burden of proving this essential element.

It is not enough for the court to judicially notice that the "Washington Post and Evening Star are circulated in interstate commerce." The proof must be that the specific issues of the paper containing the questioned advertisements were disseminated in interstate commerce. The court did not take judicial notice that those specific issues were disseminated in interstate commerce and we do not see how the court could do so.

Proof was essential that the following issues of the newspapers were disseminated in interstate commerce:

The "Washington Post" for Monday, March 8, 1965 (Count Three);

Four);

The "Washington Post" for Monday, April 5, and Tuesday, May 4, 1965 (Count Five);

The "Evening Star" for Tuesday, September 21, 1965, Monday, October 4, 18, November 8, 1965, or the "Washington Post" for Monday, September 27, 1965, or Tuesday, October 12, 1965, or Tuesday, October 26, 1965, or Monday, November 15, 1965 (Count Six).

While a judge may take judicial notice of facts that are so well and universally known that they could not be disputed, the mere fact that the judge knows, or thinks he knows something, does not justify him in taking notice of it, if it is not a proper subject of such notice.

Witkin, California Evidence, 2d Edition, P. 146, § 151.

Where judicial notice is mandatory, the effect is substantially that of a conclusive presumption; i.e., the indisputable fact must be accepted and no evidence can be offered to dispute it. (Ibid).

Under California Evidence Code § 451(f), judicial notice must be taken of facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute. However, under § 452(g), it is optional to take judicial notice of facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute. The reference to the territorial jurisdiction of the court refers to the county in which a Superior Court is located or the judicial

district in which a Municipal or Justice Court is located. In the case of the United States District Court, it would presumably be the territorial jurisdiction of the Central District of California.

In the case of Varcoe v. Lee, 180 Cal. 338, the court considered the tests to be applied in determining whether judicial notice should or should not be taken and in this connection said, at Page 346:

> "The tests, therefore, in any particular case where it is sought to avoid or excuse the production of evidence because the fact to be proven is one of general knowledge and notoriety are (1) is the fact one of common, everyday knowledge in that jurisdiction, which everyone of average intelligence and knowledge of things about him can be presumed to know; and (2) is it certain and indisputable. If it is, it is a proper case of dispensing with evidence, for its production cannot add or aid. On the other hand, we may well repeat, if there is any reasonable question whatever as to either point, proof should be required."

In the trial court, the plaintiff cited and relied upon the case of Delbridge v. U.S. (C.A.D.C. 1958), 262 F.2d 710, where the Court of Appeals for the District of Columbia took judicial notice of the fact "that the Sunday editions of the Washington newspapers are sold as far away as Raleigh, North Carolina." The facts in that case were that the defendant was

convicted of entering a store in which he had been employed and stealing $1125.66. Three years later, he told a Sheriff in California that he believed that he was wanted in the District of Columbia for the theft of $1175.00 from the named store. At his trial, he testified that on the night of the burglary, he passed the store, saw the door open, went in to investigate, saw the place in a disarray, and because he had a criminal record and was on parole, he left town and the next day he bought a paper in Raleigh, North Carolina, in which he saw a short article to the effect that the door to the store was open, that somebody had entered it, apparently with a key, and that the total sum of $1175.00 was missing. Hence, the discrepancy between the two sums above mentioned was a crucial point in the case. After conviction, defendant moved for a new trial and produced from the Library of Congress an article in the "Washington Post" on the Sunday following the burglary, stating that $1175.00 had been stolen from the store, giving its name, and that the store was evidently entered by the use of a key. The Court of Appeals held that a new trial should have been granted to permit the jury to pass upon this new evidence. Here then, we had a situation involving the Court of Appeals in the same territory where the trial was held taking judicial notice that the Sunday edition of the Washington newspapers were circulated as far south as Raleigh, North Carolina. The distinction between that case and the present case is clear. In that case, <u>the judicial notice was taken by the court sitting within the District of Columbia, where the trial was held</u>, and the fact judicially noticed related to the <u>Sunday edition</u> of the newspa-

pers published in that district. In the present case, a judge in California has taken judicial notice that newspapers published several thousand miles away in the District of Columbia were disseminated in interstate commerce. None of the issues of the newspapers involved in the instant case was a Sunday edition of a Washington newspaper. Proof of the circulation of the Washington newspaper as far south as North Carolina was not an essential element of the offense for which the defendant was on trial in the Delbridge case. In the instant case, proof of circulation of the newspaper in interstate commerce is an essential element which the plaintiff must prove beyond a reasonable doubt in order to recover the statutory penalties.

F. <u>The court erred in holding that the advertisements pleaded in Counts Three to Six stated or represented that Herbold Pomade would "impart the former natural shade or color to gray, streaked or faded hair"</u>.

The court set forth parts of the advertisements involved in these counts, which are Exhibits D, E, F and G to plaintiff's Second Amended Complaint and emphasized that the underscored portions thereof particularly made the representation prohibited by the Cease and Desist Order (C.T. 89:5 - 90:25).

Since these findings are based solely on the written advertisements themselves and not upon oral evidence, this court is not bound by the determination made by the District Court, but may read the advertisements and determine for itself

whether they do or do not represent that the Pomade will impart the former natural shade or color to gray, streaked or faded hair. The "clearly erroneous" provision of Rule 52(a) F.R.Civ.P. has no application.

U. S. v. El-O-Pathic Pharmacy, (9 Cir), 192 F.2d 62;
Brinker-Johnson Co. v. Barnes (9 Cir), 272 F.2d 25;
U. S. v. John McShain, Inc., 258 F.2d 422;
Kwikset Locks, Inc. v. Hillgren (9 Cir), 210 F.2d 483.

In reading the advertisements, the court should, of course, read the whole advertisement and determine whether they did or did not make such a representation.

The Cease and Desist Order which defendants were charged in Counts Three to Six with violating provided that, in connection with offering Herbold Pomade for sale in interstate commerce, the respondents should cease and desist from disseminating in interstate commerce any advertisement which represented that Herbold Pomade "will impart the former natural shade or color to gray, streaked or faded hair" (C.T. 12:22 - 13:14).

The Order does not define the meaning of "the former natural shade or color". In its ordinary meaning, the word "former" means prior, earlier, or previous in point of time. As used in the Order, it presumably means at some time previous to the time that the hair of the user started to fade or become gray. It does not appear, however, whether this time was immediately prior to the time that the color of the hair started to fade or become gray or to what prior period of time in the user's life reference is made.

Nor does it appear what is meant by the term "natural shade or color".

It is a well known fact that the color shade of a human's hair changes from what it was when that person was born (assuming he was born with hair). Dark hair generally tends to become lighter in color, blonde hair generally tends to become a mousy color and red hair generally tends to become sandy in color.

According to the dictionary, the word "natural" is "a state provided by nature without man made changes". Synonyms are "not acquired, true, original". "Shade" is the "degree of darkness of a color" or the "gradation of a color with reference to its mixture with black". "Color" is defined as "that quality of visual sensation distinct from form, the evaluation by the visual sense of that quality of light reflected or transmitted by a substance which is basically determined by its spectoral composition . . . that which is used for coloring, pigment, paint, dye."

See <u>Webster's New International Dictionary, 2d Edition</u>.

On the other hand, the word "natural" shade or color as used in the Cease and Desist Order may be intended to be the antonym or opposite of artificial. This could be the intent of this rather ambiguous Order, since the Findings of Fact made by the Commission states that the shade or color "produced is not natural or natural like, but, on the contrary, is artificial and unnatural." (C.T. 20:30-32). If such be the meaning of this ambiguous Order, it should be noted that the Court did not make any finding that the advertisements represented that the shade

or color resulting from the use of the Pomade was artificial or unnatural. Instead, the Court found that the advertisements represented that the Pomade would in effect restore or replace the original natural shade or color that had been lost by the hair becoming gray (C.T. 89:5 - 90:20).

The advertisements pleaded in Counts Three to Six are Exhibits D, E, F and G to the Second Amended Complaint (C.T. 24-27). Each of these advertisements in the heading or the sub-heading states, 'Just a dab a day keeps the gray away" and that 'Amazing hair cream tones down grayness. Hair looks young again." Neither Exhibit D, E nor G represent that following the use of the Pomade the color of the hair will be natural as distinguished from artificial. Hence, if the Cease and Desist Order uses the term "natural' as the opposite of "artificial" or "unnatural", neither of these advertisements violates the Cease and Desist Order (Counts Three, Four and Six, C.T. 24, 25, 27). Exhibit F involved in Count Five (C.T. 26) does state that the improvement is real and subtle "without a dyed artificial look" and upon this interpretation of the Order, such language of that advertisement would violate the Order, although this was not the basis of the finding of the trial court.

The advertisements, when read as a whole, do not state or represent that Herbold Pomade will impart the "former natural shade or color' to gray, streaked or faded hair. They do represent that the user's gray, streaked or faded hair becomes <u>young looking</u> again, but not that the young looking hair is the same shade or color with which it was endowed by nature. They also state or imply that the <u>user</u> will look younger, because the

gray, streaked or faded hair made the user look older than he was. The darkening of the hair will make him look younger. This was the underlying theme of each of the advertisements in question and the language of those advertisements is more restrained than the theme in advertisements for competitive products, which were submitted in support of the defendants' Motions for Summary Judgment.

Each of these advertisements (C.T. 24-27) states, "Not a coal tar dye, but a special rich hair cream that keeps the gray away by replacing lost color and oils so vital to young healthy-looking, well groomed hair."

Exhibits D and F both state, "as grayness gradually disappears your hair becomes young looking again," and Exhibits E and G state "as grayness gradually disappears, your hair becomes lustrous and young looking again."

Exhibit G states, "If the years have stolen the natural color and oils from your hair, leaving it gray, streaked, dry, lifeless, faded or yellowish; making you look older than you really are; simply use Herbold Pomade as your hair dressing. It will blend in lasting color just right for your hair, but will not change its shade; only brighten it."

Exhibit E is substantially the same except that it omits the words "making you look older than you really are."

Exhibit D states, "Regular use of Herbold Pomade will keep your hair young looking for as long as you use it."

Exhibit G states, "Tones down grayness. Hair looks young again without changing your natural shade." The same statement appears in substance in Exhibits D, E and F, except

except that the words "without changing your natural shade" are omitted.

In the Findings of Fact on plaintiff's Cross-Motion for Summary Judgment, the Court quoted parts of the advertisements in question and was of the view that the following statements in the advertisements, particularly the underscored portions, represented that the Pomade would impart the former natural shade or color to the hair: "Not a coal tar dye, but a special rich hair cream <u>that keeps the gray away by replacing lost color</u> and oils so vital to young healthy-looking, well groomed hair." (C.T. 89-90).

It is noted that the quoted portions of the advertisements are but a small part of one paragraph thereof and that a reading of the advertisements as a whole discloses that none of them represents that the Pomade will "impart the former natural shade or color" to the hair.

As shown by the exhibits submitted in support of defendants' Motions for Summary Judgment (C.T. 60-75), competitors are permitted by the Commission to advertise their hair coloring products by using language which the Order prohibits defendants from using. Thus, Exhibit 1, (C.T. 62), an advertisement of Grecian Formula 16, states that it will gradually build "up the natural looking color" and that after using it for two or three weeks "you can see hair color so natural you hardly remember how you looked when you were gray" and that the user will look younger, and that by the use of the product "you can change gray hair to natural looking color".

Exhibit 2 (C.T. 63), an advertisement of Kolor-Bak Pomade, states "gradually feeds a young and natural-looking color to gray hair" and that it adds a "natural looking color" to gray hair.

Exhibit 3 (C.T. 64), advertisements for Top Secret, a hair coloring product in "Esquire Magazine" and other publications, state that the product "imparts natural looking color to gray or faded hair" and the advertisement for 21 Plus "gray hair vanishes - natural looking color returns". The advertisement for Look-Younger Hair Cream states that it brings "natural looking color" to your hair gradually.

Exhibits 4 and 5 (C.T. 65-66), an advertisement of Bon Coif Hair Color Restorer by I. Magnin & Co., states that it is a "hair color restorer" and that it returns grey hair "to natural-like color instantly."

Exhibit 6 (C.T. 67), an advertisement for Loving Care by Clairol in "Readers Digest", states that it "seeks out grey and colors it young again without changing your natural hair color."

Exhibit 7 (C.T. 68), an advertisement in "Reader's Digest" of Clairol 4-Week Rinse, states that it rinses the gray away "to make your best years last longer", that it "matches your natural hair color - won't change it" and "makes hair color look young, feel young, shine like a girl's again - natural looking".

Exhibit 9 (C.T. 70), an advertisement for Great Day in the "Reader's Digest" also emphasizes that the product will make the user look much younger and states that by using it

'a man can return his graying hair to a soft, rich natural-looking color in the privacy of his own bathroom" but that "it does not change your natural hair color. It only works on the gray" and that it can say "hair color so natural only his barber knows for sure".

The remaining exhibits are all on the same theme. These advertisements were not submitted to prove that the manufacturers of the products advertised were violating the Cease and Desist Order against the defendants in the instant case, for the obvious reason that such manufacturers were not parties to such Cease and Desist Order. They were submitted primarily to show that the Commission apparently by inaction, tacitly approves advertisements for hair coloring products which state that the product will make the hair look younger or the user look younger, by changing the gray hair to a darker color or another color. If these competitors are permitted to advertise their product in the language referred to in these advertisements, and the appellants herein are prohibited from so doing, there would certainly appear to be unwarranted discrimination.

It is not asserted by the Government in this case that Herbold Pomade is not a hair coloring product or that it will not change the color of gray hair by darkening it, nor do appellants contend that the competitive products will not color gray, streaked or faded hair.

We submit that a fair reading of the advertisements does not disclose that the appellants violated the Cease and Desist Order by causing the publication of the four advertisements which are the subject of Counts Three to Six inclusive. The

affidavit of Milton Herbold (C.T. 49-76) in support of defendants' Motions for Summary Judgment and the exhibits attached thereto summarize the questioned advertisements as well as the advertisements for the competitive products, and points out at C.T. 58-59, that hair becomes gray because it has little or no melanin, that no way has been found to activate hair which has little or no melanin into producing melanin again, but that by producing pigment on the hair that is similar in appearance to melanin, it will deposit such pigment on the hair shaft, thereby changing the color of the gray hair.

VII. CONCLUSION

For each and all of the foregoing reasons, it is respectfully submitted that the Court was without statutory power to grant injunctive relief, particularly in the absence of pleading, evidence and findings showing that the plaintiff was entitled thereto, that the Court was without subject matter jurisdiction, that the findings that the questioned advertisements were disseminated in interstate commerce are unsupported by evidence, and that the questioned advertisements in Counts Three to Six do not violate the Cease and Desist Order.

The Judgment should be reversed.

Respectfully submitted,

J E Simpson

J. E. SIMPSON
Attorney for Appellants

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules and that I was responsible for the preparation of the brief.

J. E. Simpson

J. E. SIMPSON
Attorney